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April 14, 2005

VIA MESSENGER AND U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Thomas Krueger, Esq.
Associate Regional Counsel
U.S. Environmental Protection Agency
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604-3590

Re: Ellsworth Industrial Park Site, Downers Grove, Illinois
Wisconsin Avenue Property L.L.C.

Dear Mr. Krueger:

1. This letter supplements my letter dated March 3, 2005 to you on behalf of our client Wisconsin Avenue Property L.L.C. (the "Company") regarding the site at 2424 Wisconsin Avenue, Downers Grove, Illinois (the "2424 Site") which is within the limits of the Ellsworth Industrial Park Site (the "Ellsworth Site") being addressed by the U.S. Environmental Protection Agency ("EPA") pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). In the telephone conference that Ken Morency (a Company representative) and I had with you on March 18, 2005 concerning the March 3, 2005 letter, we discussed the Company's position that it is an innocent purchaser with respect to the 2424 Site and is therefore not a liable or responsible party under CERCLA Section 107(a). Pursuant to our March 18, 2005 telephone conference, this letter supplements the March 3, 2005 letter and addresses (i) the similarity of ASTM Standard E 1527-94 (the "1994 ASTM Standard") and ASTM Standard E 1527-97 (the "1997 ASTM Standard") and (ii) the possibility of a *de minimis* landowner settlement between EPA and the Company pursuant to CERCLA Section 122(g)(1)(B). We address each of these matters as follows:

Comparison of 1994 and 1997 ASTM Standards

2. As stated in the March 3, 2005 letter, the Company's believes that it "purchased" the 2424 Site, for purposes of CERCLA Section 101(35)(B), before May 31, 1997 because of the execution of the Contract for Sale of Commercial Real Estate before that date, even though title to the 2424 Site was not conveyed to the Company until June 2, 1997. As such, the Company believes that CERCLA Section 101(35)(B)(iv)(1) establishes the standards for "all appropriate inquiry" with respect to the Company's acquisition of the 2424 Site and that the Company satisfied those requirements as described in paragraph 6 of my March 3, 2005 letter. However, in paragraph 7 of my March 3, 2005 letter, we stated that, if it is determined that the Company's "purchase" of the 2424 Site occurred on June 2, 1997 (the date of delivery of the deed to the Company for the 2424 Site), then the interim standards in CERCLA Section 101(35)(B)(iv)(2) would apply to determine the requirements of "all appropriate inquiry" with respect to the Company's purchase of the 2424 Site. The interim standards in CERCLA Section 101(35)(B)(iv)(2) state that compliance with the 1997 ASTM Standard will be deemed to satisfy the requirements of "all appropriate inquiry." In this regard, Carlson Environmental, Inc. ("Carlson") stated in its Phase I Environmental Assessment dated November 11, 1996 (the "Phase I Report") that it adhered to the 1994 ASTM Standard and not the 1997 ASTM Standard. We noted in our March 3, 2005 letter that it was impossible as a practical matter for Carlson to use the 1997 ASTM Standard because the 1997 ASTM Standard was not in existence when the Phase I Report was prepared in November, 1996 and in fact was not published until May, 1997, *i.e.*, shortly before the conveyance of the 2424 Site to the Company. We also noted that in any event the 1994 ASTM Standard is substantially similar to the 1997 ASTM Standard and that compliance with the 1994 ASTM Standard should therefore be deemed compliance with the 1997 ASTM Standard if it is applicable. In our telephone conference on March 18, 2005, you suggested that we provide information to the EPA concerning the similarity of these two ASTM Standards.

3. In order to facilitate the comparison of these two ASTM Standards, I am enclosing copies of them for your reference. On the enclosed copy of the 1997 ASTM Standard, I have marked with marginal notations the changes from the 1994 ASTM Standard. As is apparent from these notations, there is very little difference between the two ASTM Standards, and none of the differences are relevant to the factual matters related to the 2424 Site. The following is a brief summary of the differences:

(a) The 1997 ASTM Standard includes a new Paragraph 1.1.6 requiring that the written report of the Phase I environmental site assessment must include documentation from sources, records and resources utilized in conducting the inquiry. This new Paragraph 1.1.6 does not expand the scope of the inquiry required to comply with the ASTM Standard but merely requires that backup documentation must be included in the written report.

(b) Several paragraphs in the 1997 ASTM Standard include new references to the CORRACTS list (EPA's list of treatment, storage and disposal facilities subject to RCRA corrective action). The 1994 ASTM Standard did not include any such references to the CORRACTS list. The paragraphs in the 1997 ASTM Standard that refer to the CORRACTS list include (i) Paragraph 3.2.6 (definition), (ii) Paragraph 3.4.4 (acronym) and (iii) Paragraph 7.2.1.1 (minimum search distances for Standard Environmental Record Sources). None of these new provisions in the 1997 ASTM Standard are applicable to the 2424 Site because there is no information that the 2424 Site was ever considered a RCRA treatment, storage or disposal facility.

(c) Paragraphs 3.3.24 and 7.1.4.3 describe the term "practically reviewable" for purposes of the 1994 and 1997 ASTM Standards. These two Paragraphs in the 1997 ASTM Standard contain the following sentence which is not in the comparable Paragraphs of the 1994 ASTM Standard: "Listings in publicly available records which do not have adequate address information to be located geographically are not generally considered practically reviewable." This sentence actually relaxes the requirements in the 1997 ASTM Standard from those in the 1994 ASTM Standard, so the requirements in the 1994 ASTM Standard are more stringent in this regard than those in the 1997 ASTM Standard. Further, this change has no relevance to the Phase I Report for the 2424 Site.

(d) Paragraph 7.2.1.1 describes the minimum search distances for standard federal and state environmental record sources. In the 1994 ASTM Standard, the minimum search distance for state lists of hazardous waste sites (CERCLIS equivalents) is 1 mile. In the 1997 ASTM Standard, this minimum search distance was reduced to 0.5 mile.

(e) There are several merely clerical differences between the two ASTM Standards, as follows:

(i) Paragraph 3.3.11 in the 1994 ASTM Standard establishes standards for an environmental professional as a person having the ability to develop conclusions regarding recognized environmental conditions. In the 1997 ASTM Standard, the words "opinions and" are added before the word "conclusions."

(ii) The acronym "ASTM" is contained in Paragraph 3.4 of the 1994 ASTM Standard but not in the 1997 ASTM Standard.

(iii) Paragraph 7.1.4.2 of the 1994 ASTM Standard (the description of reasonable time and cost) states that information is obtainable within

reasonable time and cost constraints if it is provided by any source within 20 days of receiving a written request. The 1997 ASTM Standard changes "20 days" to "20 calendar days."

(iv) Paragraphs 7.2.3 and 7.3.2 of the 1994 ASTM Standard refer to USGS 7.5 minute topographic maps. These Paragraphs in the 1997 ASTM Standard add the phrase "(or equivalent)" after each such reference to the topographic maps.

(v) Several Paragraphs in the 1997 ASTM Standard change the designation "e.g." in the 1994 ASTM Standard to the words "for example."

It is obvious from the foregoing, and from the enclosed copies of the two ASTM Standards, that the differences between the 1994 ASTM Standard the 1997 ASTM Standard are immaterial with respect to Carlson's Phase I Report concerning the 2424 Site. Therefore, Carlson's reference to the 1994 ASTM Standard for the Phase I Report should not be considered a defect in the Company's compliance with the requirements of "all appropriate inquiry" in CERCLA Section 101(35)(B) for purposes of its status as an innocent landowner.

4. We note also that Paragraph 4.5.1 in both the 1994 and the 1997 ASTM Standards contains statements that adherence to the Standard does not eliminate uncertainty, as follows:

> "4.5.1 *Uncertainty Not Eliminated*—No *environmental site assessment* can wholly eliminate uncertainty regarding the potential for *recognized environmental conditions* in connection with a *property*. Performance of this practice or E 1528 [the practice for transaction screens] is intended to reduce, but not eliminate, uncertainty regarding the potential for *recognized environmental conditions* in connection with a property, and both practices recognize reasonable limits of time and cost."

This statement clearly establishes that compliance with the ASTM Standard does not eliminate all uncertainty.

5. The Company hopes that the foregoing information will assist EPA in its evaluation of the Company's innocent purchaser status. Please let us know if we can provide additional information to assist EPA in this regard.

<u>*De Minimis* Landowner Settlement</u>

6. You mentioned in the March 18, 2005 telephone conference that EPA might consider entering into a *de minimis* landowner settlement with the Company in lieu of providing a concurrence that the Company is an innocent purchaser with respect to the 2424 Site. Such a *de minimis* landowner settlement would be pursuant to CERCLA Section 122(g)(1)(B) which

provides for such settlements with any potentially responsible party ("PRP") as to which the following conditions are satisfied:

(a) The PRP is the owner of the real property on or in which the facility is located;

(b) The PRP did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the facility;

(c) The PRP did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission; and

(d) When the PRP purchased the facility, the PRP did not have actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment or disposal of any hazardous substance.

7. EPA has issued its "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA and Settlements with Prospective Purchasers of Contaminated Property" dated June 6, 1989 (the "EPA Guidance") that describes, among other things, conditions and requirements to be satisfied with respect to any *de minimis* landowner settlement under CERCLA Section 122(g)(1)(B). Section III.C (on page 7) of the EPA Guidance provides that "[t]he requirements which must be satisfied in order for [EPA] to consider a settlement with landowners under the de minimis settlement provisions of Section 122(g)(1)(B) are substantially the same as the elements which must be proved at trial in order for a landowner to establish a third party defense under Section 107(b)(3) and Section 101(35) [the innocent purchaser defense]." The Company does not agree that the standards for eligibility for the *de minimis* landowner settlement are the same as those that apply to the innocent purchaser defense; rather, the standards for a *de minimis* landowner settlement are less stringent than those that apply to the innocent purchaser defense. For example, the requirements for the innocent purchaser defense require that the purchaser conduct "all appropriate inquiry" under the standards described in CERCLA Section 101(35), but CERCLA Section 122(g)(1)(B) requires only that the PRP not have actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance. The absence of actual or constructive knowledge, for purposes of a *de minimis* landowner settlement, on its face appears to be a lower standard than the standards for "all appropriate inquiry" relevant to the innocent purchaser defense. While the Company does not admit or concede that the standards are the same for the innocent purchaser defense and for a *de minimis* landowner settlement, the Company will, for the sake of argument in this letter, provisionally assume with EPA that the standards are the same. By making this provisional assumption, the Company does not admit or concede that it is a PRP with respect to the 2424 Site or the Ellsworth Site.

8. On the basis of the provisional assumption in paragraph 7 above, the March 3, 2005 letter, which establishes the Company's eligibility for the innocent purchaser defense, also establishes its eligibility for a *de minimis* landowner settlement under CERCLA Section 122(g)(1)(B). In this regard, it would be redundant to repeat in this letter the same factual material that was provided in the March 3, 2005 letter, so we do not do so and simply refer to the March 3, 2005 letter for that information. We do, however, point out that the March 3, 2005 letter includes information that operations at the 2424 Site after the Company acquired title in 1997 did not cause or contribute to any releases of hazardous substances at the 2424 Site and that such releases, if any, occurred before the Company's acquisition of title in 1997. Further, the Company's satisfaction of the "all appropriate inquiry" requirements for purposes of the innocent purchaser defense exceeded the standards that are necessary to establish that the Company did not have actual or construction knowledge of the hazardous substance releases for purposes of CERCLA Section 122(g)(1)(B).

9. Based on the foregoing, while the Company does not admit or concede that it is a PRP or anything other than an innocent purchaser, the Company requests that EPA enter into a *de minimis* landowner settlement with the Company pursuant to CERCLA Section 122(g)(1)(B) and advise the Company of terms that EPA would propose for such a settlement. Based on the merits of the Company's innocent purchaser defense, the Company requests that EPA not require any cash consideration for the *de minimis* landowner settlement and instead accept the Company's agreement to provide access to the 2424 Site and "due care assurances" as referred to in Section IV.B.3 (page 19) of the EPA Guidance. Section IV.B.1 (page 16) of the EPA Guidance provides that the "general goal of a de minimis settlement is to allow parties who meet the criteria set forth in Section 122(g)(1)(A) or (B) to resolve their potential liability as quickly as possible, thus minimizing litigation costs and allowing the government to focus its resources on negotiations or litigation with the major parties." In order to implement this goal of expedited settlement, the Company requests that EPA proceed on an expedited basis to respond to the Company's request that EPA implement such a settlement with the Company.

We look forward to your early response to this letter.

Very truly yours,

Timothy Ramsey

Enclosures